Re Public Bank Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–316 OF 2000
KANG HWEE GEE J
13 FEBRUARY 2001

Civil Procedure *— Affidavits — Deposition of — Deposition by mere official without specific portfolio of bank — Applicant authorized to affirm affidavit — Whether sufficient*

Land Law *— Charge — Registration — Extension of time for — Failure to register for over five years — Whether prejudicial to creditors or members of company — Delay, whether impediment to extension — Inadequacy of supporting affidavit — Failure to register amounted to offence, whether court may still grant extension*

The applicant bank sought an order that the lodgment of registration of two charges it had created in respect of two pieces of land be extended. The grounds supporting the aforementioned application were set out in the affidavit of Lim Chee Keong, a person without a specific job function but who had been authorized by the applicant to affirm the affidavit. Lim Chee Keong did not disclose to the court precisely what position of authority he holds in the applicant bank. One of the issues was whether it is acceptable for a mere official without any specific portfolio who happens to be acquainted with the matter to depose an affidavit.

Held, disallowing the application:

(1) It would be necessary for the bank to ensure that only persons holding a position of responsibility good enough to carry its implied authority should depose the affidavit — usually the bank manager, or where the establishment is large, at least the relevant sectional head. It would be unacceptable for a mere official without any specific portfolio who happens to be acquainted with the matter to depose an affidavit (see p 335A–B).

(2) A court deciding whether to grant an extension has to enquire as a matter of priority whether the order would not prejudice the position of creditors or members of the company. It would for instance, have to enquire whether for the duration that the charge remained unregistered, any person had been induced to give the company any credit on the footing that the assets of the company were not subject to any charge. In short, it has to satisfy itself that there is no sinister reason why the charge was not registered within the period required (see pp 336C–D).

A court exercising its power to grant an order of extension under s 114 of the Companies Act 1965 ('the Act') is in fact dispensing equity to moderate the strict requirement of statute. It follows that where it could be ascertained with certainty that the failure to register was only due to the accidental act or

inadvertence of any party and that the interest of others would not be affected by the extension, the application should as a matter of conscience be allowed. Delay or procrastination in making the application, being merely a secondary factor should not under the circumstances be an impediment to the making of the order (see p 336D–E).

(3) In the instant application, the supporting affidavit had fallen short of the requirement envisaged by Vaisey J in *Re Kris Cruisers* 1948] All ER 1105. The poverty of its content was glaring. All that was disclosed by the deponent was that the omission to register was due to inadvertence without so much as to state how it was brought about and by whom. Nothing was said as to why the omission was left to linger for over five years. Neither did the deponent commit himself to say whether the making of the order applied for would prejudice any creditor or member of the company, an important factor which the court was bound to consider before making the order — more so in this case where the delay was considerable (see pp 337I–338A).

(4) Under s 109 of the Act, the company and any officer who is in default commits an offence if they fail to comply with the preceding s 108 of the Act to lodge the charge for registration within 30 days of its creation. For as long as the company remains an offender, it would be inappropriate for the court to lend its hand to grant an order of extension (see p 338B–C).

(5) In the interest of expediency, however, provided the applicant is prepared to own up to the offence, an order for extension may be granted on the condition precedent that the applicant pays the penalty the registrar of companies may impose. In the event, it would be necessary for the applicant to state in the supporting affidavit whether it would be prepared to admit to the offence and to pay the penalty (see p 338C-D).

[Bahasa Malaysia summary

Pemohon bank memohon satu perintah agar kemasukan pendaftaran dua gadaian yang ia telah buat berhubung dua bidang tanah dilanjutkan. Alasan-alasan yang menyokong permohonan tersebut telah dinyatkan dalam afidavit Lim Chee Keong, seorang tanpa sebarang fungsi kerja yang khusus tetapi telah diberi kuasa oleh pemohon untuk mengesahkan afidavit tersebut. Lim Chee Keong tidak mendedahkan kepada mahkamah dengan tepat apa kedudukan berpengaruh yang beliau pegang dalam pemohon bank. Salah satu daripada persoalan adalah sama ada ia diterima untuk seorang pegawai sahaja tanpa apa-apa portfolio khusus yang kebetulan berkaitan dengan perkara tersebut untuk memberikan keterangan bersumpah satu afidavit.

Diputuskan, tidak membenarkan permohonan tersebut: A

(1) Adalah satu keperluan bagi bank untuk memastikan bahawa hanya mereka yang memegang jawatan yang cukup bertanggungjawab untuk menjalankan kuasa tersiratnya boleh mendepos afidavit — biasanya pengurus bank, atau di dalam satu pertubuhan yang besar, sekurang-kurangnya ketua bahagian yang berkenaan. Adalah tidak boleh diterima untuk seorang pegawai semata-mata tanpa sebarang portfolio tertentu yang secara kebetulan mengetahui perkara tersebut untuk mendepos afidavit (see p 335A–B). B

(2) Mahkamah yang memutuskan sama ada untuk membenarkan satu lanjutan harus mengutamakan persoalan sama ada perintah tersebut tidak memprejudiskan kedudukan pemiutang atau ahli-ahli syarikat. Ia harus sebagai contoh, bertanya sama ada untuk tempoh gadaian tersebut kekal tidak berdaftar, sesiapa akan dipengaruhi untuk memberikan syarikat tersebut apa-apa bantuan kewangan berdasarkan bahawa aset-aset syarikat tersebut tidak tertakluk kepada apa-apa gadaian. Pendek kata, ia harus berpuas hati bahawa tiada sebab yang mencurigakan kenapa gadaian tersebut tidak didaftarkan dalam tempoh yang dikehendaki (lihat ms 336C–D). C D

Mahkamah yang menggunakan kuasanya untuk membenarkan satu perintah lanjutan di bawah s 114 Akta Syarikat 1965 ('Akta tersebut') adalah pada hakikatnya melaksanakan ekuiti bagi menyederhanakan keperluan ketat statut. Selanjutnya di mana ia boleh dipastikan dengan tepat bahawa kegagalan untuk mendaftar hanya disebabkan tindakan yang tidak disengajakan atau kelalaian mana-mana pihak dan bahawa kepentingan yang lain tidak terjejas oleh lanjutan tersebut, permohonan tersebut sepatutnya sebagai satu perkara mengikut hati nurani harus dibenarkan. Kelewatan atau kelengahan dalam membuat permohonan tersebut, yang hanya faktor sampingan tidak sepatutnya dalam apa keadaan menjadi penghalang dalam membuat perintah tersebut (lihat ms 336D–E). E F G

(3) Dalam permohonan sekarang, afidavit sokongan tiada keperluan yang dibayangkan oleh Vaisey J dalam *Re Kris Cruisers* [1948] All ER 1105. Kekurangan dalam kandungannya amat ketara. Apa yang dikemukakan oleh deponen adalah bahawa peninggalan untuk mendaftar tersebut disebabkan oleh kelalaian tanpa banyak menyatakan bagaimana ia bermula dan oleh siapa. Tiada apa-apa tentang kenapa peninggalan tersebut dibiarkan berlarutan selama lima tahun. Deponen tidak menyatakan sendiri sama ada dengan membuat perintah yang dipohon tersebut akan memprejudiskan mana-mana pemiutang atau ahli syarikat, satu faktor penting yang mahkamah sepatutnya pertimbangkan sebelum membuat perintah tersebut — lebih-lebih lagi dalam kes ini di mana kelewatan adalah melampau (lihat ms 337I–338A). H I

A (4) Di bawah s 109 Akta tersebut, syarikat tersebut dan mana-mana pegawai yang telah ingkar melakukan satu kesalahan jika mereka gagal untuk mematuhi s 108 Akta tersebut untuk memasukkan gadaian untuk pendaftaran dalam tempoh 30 hari gadaian dibentuk. Selagi syarikat tersebut kekal sebagai pesalah, adalah tidak sesuai untuk mahkamah campur tangan untuk
B membenarkan satu perintah lanjutan (lihat ms 338B–C).

(5) Atas alasan kewajaran, bagaimanapun, tertakluk pemohon bersedia mengaku terhadap kesalahan tersebut, satu perintah lanjutan mungkin boleh diberikan dengan terma bersyarat bahawa pemohon membayar penalti yang dikenakan oleh
C pendaftar syarikat. Dalam keadaan ini, adalah perlu untuk pemohon menyatakan dalam afidavit sokongan sama ada ia akan bersedia untuk mengaku terhadap kesalahan dan membayar penalti tersebut (lihat ms 338C–D).]

D **Notes**

For cases on affidavits generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

For cases on registration of a charge, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2035–2043.

E **Cases referred to**

Kris Cruisers Ltd, Re [1948] All ER 1105 (refd)

United Overseas Bank v Forward Overseas Credit [1988] 1 MLJ 496 (refd)

F **Legislation referred to**

Companies Act 1965 ss 108(1), 114

Companies Act 1948 [Eng] s 101

G *Koh Meng Hui* (*Iza Ng Yeoh & Kit*) for the applicant.

Kang Hwee Gee J:. By this ex parte summons, the applicant bank seeks an order under s 114 of the Companies Act 1965 ('the Act') that the lodgment with the registrar of companies of registration of two charges it had created in respect of two pieces of land be extended.

H The grounds supporting this application were set out in the affidavit of Lim Chee Keong, a person who appeared to have no specific function but who nevertheless had been authorized by the applicant to affirm the affidavit, an issue which I shall revert to shortly.

The relevant paragraphs of his affidavit read as follows:

I 1 Saya adalah seorang pegawai pemohon yang mengendalikan perkara ini dan saya telah diberi kuasa yang sempurnanya untuk membuat afidavit ini untuk dan bagi pihak pemohon yang dinamakan di atas.

2 Segala fakta-fakta yang dinyatakan di sini adalah dari pengetahuan saya sendiri dan/atau dari rekod di mana saya mempunyai akses yang penuh kecuali di mana dinyatakan sebaliknya

3 Pihak pemohon telah meluluskan pinjaman berjumlah RM1,320,000 ('pinjaman pertama') kepada Soon Ee Sing Hardware Sdn Bhd (No Syarikat 117342–W) ('peminjam tersebut') melalui sepucuk surat bertarikh 24 Oktober 1994 ('surat pertama') dijamin oleh suatu gadaian atas ke semua harta yang dipegang di bawah HS(D) 85297 PT No 24132, Pekan Serendah, Daerah Petaling, Negeri Selangor ('hakmilik pertama)

4 Peminjam tersebut telah melalui suatu gadaian bertarikh 13 Januari 1996 ('gadaian pertama') dan perserahan No 295/96 Jilid 1 Folio 183 menggadaikan hakmilik pertama kepada pemohon untuk menjamin pinjaman pertama serta faedah

5 Sesalinan surat pertama dan gadaian pertama dilampirkan di sini dan ditanda secara kumpulan sebagai eksh 'A

6 Pihak pemohon juga telah meluluskan pinjaman berjumlah RM418,000 ('pinjaman kedua') kepada peminjam tersebut melalui sepucuk surat bertarikh 5 Mac 1996 ('surat kedua') dijamin oleh suatu gadaian atas ke semua harta yang dipegang di bawah HS(D) 2151 PT No 1355, Mukim Serendah, Daerah Ulu Selangor, Negeri Selangor ('hakmilik kedua')

7 Peminjam tersebut telah melalui suatu gadaian bertarikh 28 Mac 1996 ('gadaian kedua') dan Perserahan No 41205/96 Jilid 98 Folio 55 menggadaikan hakmilik kedua kepada pemohon untuk menjamin pinjaman kedua serta faedah.

8 Sesalinan surat kedua dan gadaian kedua dilampirkan di sini dan ditanda secara kumpulan sebagai eksh 'B'.

9 Saya telah dinasihati dan sesungguhnya percaya bahawa Borang 34 hendaklah difailkan dalam jangkamasa tiga puluh (30) hari selepas wujudan gadaian pertama dan gadaian kedua menurut s 108 Akta Syarikat 1965.

10 Pada 14 Mac 2000, saya telah menyemak dokumentasi-dokumentasi mengenai pinjaman-pinjaman kepada peminjam tersebut dan didapati bahawa Borang 34 mengenai gadaian pertama dan gadaian kedua belum difailkan oleh peminjam tersebut

11 Oleh yang demikian, saya dengan rendah hati memohon kepada mahkamah yang mulia ini untuk suatu perintah seperti yang dipohon dalam saman dalam kamar yang difailkan di sini.

Before considering the substance of this application, it is necessary that I allude first to the capacity of Lim Chee Keong to speak for the applicant in making this application. He did not disclose precisely what position of authority he holds in the application bank apart from saying he was an officer who was authorized to make the affidavit, that he had access to the records of the bank, and that what he deposed to in his affidavit was from his own knowledge.

A The affidavit, it must be appreciated, commits the bank to assume the responsibility for any consequence that may arise therefrom. In addition the affidavit carries with it the integrity of the bank for all that have to be said therein which the court have to rely upon and accept. It would therefore be necessary for the bank to ensure that only persons holding a position of responsibility good enough to carry its implied authority should depose the B affidavit — usually the bank manager, or where the establishment is large, at least the relevant sectional head. It would be unacceptable for a mere official without any specific portfolio who happens to be acquainted with the matter to depose an affidavit.

Now, to return to the substance of the application.

C Section 114 of the Act reads as follows:

> Extension of time and rectification of register of charges
> The Court, on being satisfied that the omission to register a charge (whether under this or any corresponding previous written law) within the time required or that the omission or mis-statement of any particular with D respect to any such charge or in a memorandum of satisfaction was accidental or due to inadvertence or to some other sufficient cause or is not of a nature or prejudice the position of creditors or shareholders or that on other grounds it is just and equitable to grant relief, may on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient (including a term or condition that the extension or E rectification is to be without prejudice to any liability already incurred by the company or any of its officers in respect of the default) order that the time for registration be extended or that the omission or mis-statement be rectified.

The first charge was on land held under HS(D) 85297 PT No 24132, Pekan Serdang, Daerah Petaling and was created on 13 January 1996 vide Presentation No 295/96 Jilid 1 Folio 183.

F The second was on land held under HS(D) 2151 PT No 1355, Mukim Serendah, Daerah Ulu Selangor, Negeri Selangor and was created on 28 March 1996 vide Presentation No 41205/96 Jilid 98 Folio 55.

Under s 108 of the Act, the applicant would be required to lodge for registration with the Registrar of Companies a statement of the prescribed G particulars in respect of each charge within 30 days of its creation.

Both the charges were created some five years back. The delay to lodge the prescribed particulars in due compliance with s 108 of the Act was clearly inordinate and had in face exposed the applicant to an offence under s 109 of the Act which read as follows:

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> Duty to register charges
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> (1) Documents and particulars required to be lodged for registration in accordance with s 108 may be lodged for registration by the company concerned or by any person interested in the documents, but if default is made in complying with that section the company and every officer of I the company who is in default shall be guilty of an offence against this Act.
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> Penalty: Two thousand ringgit. Default penalty.

Under s 108(1) of the Act, a failure to register a charge on a land within 30 days of its creation under s 108 of the Act will render it void against the liquidator or creditor of the company with the dire consequence that the chargee would be relegated to the position of an unsecured creditor if the company goes into liquidation. An order granting the extension of time for the registration of a charge would under the circumstances, provide the saving grace for the chargee — for it has the effect of making the charge valid ab initio, although its priority if called into question, would still have to be decided by the normal rules pertaining to its creation (*United Overseas Bank v Forward Overseas Credit* [1988] 1 MLJ 496, per Grimberg JC of the Singapore High Court).

A court deciding whether to grant an extension has to enquire as a matter of priority whether the order would not prejudice the position of creditors or members of the company. It would for instance, have to enquire whether for the duration that the charge remained unregistered, any person had been induced to give the company any credit on the footing that the assets of the company were not subject to any charge. In short it has to satisfy itself that there is no sinister reason why the charge was not registered within the period required.

A court exercising its power to grant an order of extension under s 114 is in fact dispensing equity to moderate the strict requirement of statute. It follows that where it could be ascertained with certainty that the failure to register was only due to the accidental act or inadvertence of any party and that the interest of others would not be affected by the extension, the application should as a matter of conscience be allowed. Delay or procrastination in making the application, being merely a secondary factor should not under the circumstances be an impediment to the making of the order.

In order to assist the court to arrive at an appropriate order, it would therefore be necessary for the applicant to state clearly in his affidavit whether he is making the application on this ground alone. He would have to declare in such a case that the making of the order would not prejudice the position of any creditors or members of the company.

On the other hand, where it is clear that the granting of the order would prejudice the position of any creditors or members of the company, it would be incumbent on him to set out in his application the circumstances as to how they would be so affected so as to enable the court to assess the application by the last criteria prescribed in s 114 of the Act — whether it is just and equitable to grant the relief sought. To ensure that an order is not obtained behind their backs it would be necessary to make them a party to the application.

The approach that I have set forth, stems at least in part from the observation of Vaisey J of the Chancery Division in *Re Kris Cruisers Ltd* [1948] All ER 1105, which I consider sound and of contextual relevance.

In that case, a company (which was insolvent at the time the application was made) had failed to register two instruments of charge within the time prescribed under an identical provision of s 101 of the English Companies

A Act 1948. The omission was due to the fact that the secretary of the company had thought that the chargees had registered them while the chargees had thought the secretary had done so. The affidavit evidence supporting the application was sparse and meagre but nevertheless in the circumstances of that case was held to be sufficient, the insolvency notwithstanding. Vaisey J in granting an order in terms said at the opening paragraph of his judgment:

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> This is an application, under the Companies Act 1948, s 101, asking the court to extend the time for delivering to the Registrar of Companies, for registration, two instruments of charge, dated 7 March 1947. In this case, as in others which have come before me, I desire to call attention to the meagre character of the evidence filed in support, which, however, in this case seems to me to be just, thought only just, sufficient to satisfy the provisions of the section. I think it is most important that the court should be fully informed of the circumstances which have given rise to the omission to register within the proper time and that the evidence should not, as is so often the case, merely state that the matter was accidental and due to inadvertence without particularising the reasons for the breach of the statutory requirements and the surrounding circumstances. People seem to be under the impression that, on their merely saying that the omission was 'due to inadvertence,' the court is practically obliged to exercise the power, which I hold to be a discretionary power, under the Companies Act, 1948 s 101. This section replaced the Companies Act 1929, s 85, which itself was taken from s 96 of the Act of 1908, and that, in run, reproduced s 15 of the Act of 1900.

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Further down in the fourth paragraph he said:

> There is a statutory right in the mortgagee or chargee to come to the court to be relieved of the consequences of his own negligence and lack of caution, provided that the court is satisfied that the omission to register was not with any fraudulent intention, but was, in the words of the Companies Act 1948, s 101, 'due to inadvertence or to some other sufficient cause.' Pausing there, I think that the words, 'some other sufficient cause,' would be satisfied if it were proved that the secretary of a company had been wrongly advised by his solicitor or counsel that registration need not be sought. There are other possible circumstances to which those additional words following the word 'inadvertence' might apply. In the present case the inadvertence was due to an obvious mistake. The solicitors of the chargees thought that the secretary of the company had registered the charges, as he ought to have done, and the secretary of the company thought that the chargees had registered the charges, as they might have done, and between the two of them, each supposing the other had carried out the requirements of the section, they overlooked the fact that neither of them had done so. That seems to me to be inadvertence, inatention, carelessness, but very far removed from the kind of case in which this relief should be refused — a typical case of which would be one in which there was some fraudulent or improper motive in withholding the knowledge of the existence of the charge from the public, to whom its registration would have given the appropriate notice.

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In the instant application, it is clear the supporting affidavit has fallen short of the requirement envisaged by Vaisey J in *Re Kris Cruisers*. The poverty of its content is glaring. All that was disclosed by the deponent is that the omission to register was due to inadvertence without so much as to state

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how it was brought about and by whom. Nothing was said as to why the omission was left to linger for over five years. Neither did the deponent commit himself to say whether the making of the order applied for would prejudice any creditor or member of the company, an important factor which the court is bound to consider before making the order — more so in this case where the delay was considerable.

Quite apart from the question of inadequacy of the supporting affidavit, there is another aspect of the application that must be addressed. Under s 109 of the Act, the company and any officer who is in default commits an offence if they fail to comply with the preceding s 108 of the Act to lodge the charge for registration within 30 days of its creation. For as long as the company remains an offender, it would be inappropriate for the court to lend its hand to grant an order of extension.

In the interest of expediency, however, provided the applicant is prepared to own up to the offence, an order for extension may be granted on the condition precedent that the applicant pays the penalty the registrar of companies may impose. In the event, it would be necessary for the applicant to state in the supporting affidavit whether it would be prepared to admit to the offence and to pay the penalty.

In the instant application, the supporting affidavit fails to satisfy the requirement of s 114 of the Act. The application is disallowed. The applicant is, however, at liberty to make a fresh application with all the requisite materials.

Application disallowed.

Reported by Wong Ee Lynn